No. 80-1565

Office-Supreme Court, U.S.
FILED
JUN 12 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

In re GEIGER ENTERPRISES, INC., *Debtor.*

CENTRAL TRUST COMPANY ROCHESTER N.Y.,
Petitioner,

vs.

OFFICIAL CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., GEIGER ENTERPRISES, INC., AMOCO OIL COMPANY, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

DONALD P. SHELDON
Attorney for Official Creditors' Committee of Geiger Enterprises, Inc.
14 Lafayette Square
Buffalo, New York 14203

DANIEL E. BRICK
Attorney for Geiger Enterprises, Inc.
91 Tremont Street
North Tonawanda, New York 14120

BRICK, BRICK & ELMER, P.C.
91 Tremont Street
North Tonawanda, New York 14120
Of Counsel

DAVID K. FLOYD
Attorney for Amoco Oil Company
3400 Maine Midland Center
Buffalo, New York 14203

ROBERT M. SPAULDING
WILLIAM J. BROWN
PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
3400 Marine Midland Center
Buffalo, New York 14203
Of Counsel

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Question Presented

Whether the United States Court of Appeals for the Second Circuit properly held that Section 403 of Title IV of the Bankruptcy Reform Act of 1978 permits dismissal of a case filed under the old Bankruptcy Act to allow the filing of a new petition for relief under Chapter 11 of the new Bankruptcy Code and to seek consolidation with other cases filed by affiliated debtors under the Bankruptcy Code, provided that under the facts of the case, creditors' substantive rights are not materially prejudiced?

Rule 28.1 Statement

Respondent Official Creditors' Committee of Geiger Enterprises, Inc. has forwarded to the Court a letter dated June 3, 1981 regarding this rule.

Respondent Geiger Enterprises, Inc. is related to or affiliated with:

1. River Road Oil Co., Inc.;
2. Willie the Whale, Inc.;
3. Auto Stop Gas, Inc.;
4. Oilatomic, Inc.;
5. Budget Gas, Inc.;
6. Queen City Filling and Manufacturing Inc.;
7. Hard Rock Paving Company, Inc.;
8. Harold J. Geiger; and,
9. Patricia L. Geiger.

Respondent Amoco Oil Company has previously filed the required disclosure with its Notice of Appearance.

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Statutes and Rules.

Bankruptcy Act, ch. 541, 30 Stat. 544, as added by ch. 575, 52 Stat. 840, former 11 U.S.C. §1 *et seq.*:

11 U.S.C. §1 *et seq.* i,5,6
Chapter I, 11 U.S.C. §1(28) 2
Chapter XI, 11 U.S.C. §701 *et seq.* 2,5,6

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.*, enacting the Bankruptcy Code, 11 U.S.C. (Supp. III) §101 *et seq.*:

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Rules of Bankruptcy Procedure:

Rule 11-42 5,6

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CENTRAL TRUST COMPANY ROCHESTER N.Y.,

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vs.

OFFICIAL CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., GEIGER ENTERPRISES, INC., AMOCO OIL COMPANY, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents[1] Official Creditors' of Geiger Enterprises, Inc., Geiger Enterprises, Inc. ("Geiger Enterprises"), and Amoco Oil Company, respectfully request that this Court deny the petition for a writ of certiorari which seeks review of the Second Circuit's decision in this case, which is reported at 635 F.2d 106 (2d Cir. 1980).

[1] The United States of America is also a respondent and has filed its memorandum with the Court.

Statement of the Case

For purposes of this brief, respondents adopt the statement of facts contained in the memorandum of the United States with the following revised and additional facts.

On August 15, 1979, Geiger Enterprises filed a petition for relief under Chapter XI of the Bankruptcy Act. On October 1, 1979, the new Bankruptcy Code, 11 U.S.C. §101 *et seq.*, became effective. Thereafter, nine petitions for relief were filed under the newly effective Bankruptcy Code by seven corporations and two persons affiliated with Geiger Enterprises.

Petitioner Central Trust is an unsecured rather than a secured creditor of Geiger Enterprises. Central Trust holds a promissory note made by Geiger Enterprises which is secured by a mortgage given by River Road Oil Co., Inc., an affiliated Bankruptcy Code debtor. The mortgage covers no property of Geiger Enterprises. Bankruptcy Act §1(28), former 11 U.S.C. §1(28); 11 U.S.C. §506(a).

A hearing on Geiger Enterprises' motion for dismissal of its Chapter XI petition was conducted on February 4, 1980. Only the United States and Central Trust appeared in opposition to the motion (J.A. 204).[2] One other "creditor" announced an objection, without providing reasons, or participating in that hearing or subsequent appeals (J.A. 242-243). The Official Creditors' Committee, representing all unsecured creditors, supported the dismissal motion as did Amoco Oil Company, a creditor holding an unsecured claim in excess of $1,700,000.00 (J.A. 204).

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[2] "J.A." is the Joint Appendix below which respondents have requested be certified and transmitted to this Court.

At the hearing, the only witness was Caesar A. Cosci (J.A. 92-170, 232-238), a Certified Public Accountant, who had been appointed by the Bankruptcy Court as accountant for Geiger Enterprises. He testified as follows:

1. The income of all the 7 Corporations[3] has been consolidated and the expenses of all of the 7 Corporations has been paid therefrom (J.A. 95-96, 129-138).

2. The records of the income of the 7 Corporations were inadequate to identify the separate income of any of the 7 Corporations (J.A. 110-114, 129-138).

3. The records of the expenses of the 7 Corporations were inadequate to identify the separate expenses of any of the 7 Corporations (J.A. 110-114, 129-138).

4. The records of the assets of the 7 Corporations were inadequate to identify the ownership of the separate assets of any of the 7 Corporations (J.A. 99-100).

5. There were no records of the cash income of the 7 Corporations with which to identify the separate cash income of any of the 7 Corporations (J.A. 111-114).

6. The 7 Corporations were operated as a single unit (J.A. 99, 52).

7. The employees of all of the 7 Corporations were paid by one of the 7 Corporations (J.A. 105-106, 138, 155).

8. The 7 Corporations were operated with little or no attention paid to the formalities usually observed in independent corporations (J.A. 152-153).

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[3] At the hearing, the "7 Corporations" were designated by Mr. Cosci as: Geiger Enterprises, Inc.; Oilatomic, Inc.; Willie the Whale, Inc.; River Road Oil Co., Inc.; Hard Rock Paving Company, Inc.; Queen City Filling and Manufacturing, Inc.; and, Budget Gas, Inc. (J.A. 58).

9. Funds were shifted back and forth between the 7 Corporations (J.A. 153-154).

10. Such shifting of funds was in an extremely complex pattern (J.A. 154).

11. The funds of the 7 Corporations were, in effect, pooled together (J.A. 154).

12. Loans were made back and forth between the 7 Corporations (J.A. 154).

13. Borrowings were made by some of the 7 Corporations to pay obligations of others of the 7 Corporations (J.A. 154).

14. Funds due some of the 7 Corporations were used to pay liabilities and expenses of others of the 7 Corporations (J.A. 154).

15. Withdrawals and payments were made from and to corporate accounts without sufficient recording on the books (J.A. 155).

16. It would be impossible to prepare an accurate statement of the individual financial condition of each of the 7 Corporations (J.A. 159-160).

17. Auditing of the 7 Corporations' financial condition, and especially the intercompany relationships would require great expenditure of time and expense (J.A. 155).

18. Such audit would result in no assurance of a fair reflection of the separate conditions of the 7 Corporations (J.A. 155).

19. It would be impossible to audit the 7 Corporations and produce a fair reflection of the separate condition of the 7 Corporations (J.A. 155-156).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The remand proceedings may resolve the issues raised by this petition.

As suggested by the United States in its memorandum (p. 5), the issue raised by this petition may be mooted by the remand proceeding which is presently pending before the Bankruptcy Court. Judicial economy would best be served by a denial of this petition since a subsequent petition would be likely if respondents prevail at the remand proceeding. Review of all the proceedings below at that time would permit the Court to consider all present and subsequent issues in a more developed posture.

II. The decision below does not conflict with decisions of other circuits.

No present conflict exists among the Courts of Appeals on the issue presented by this petition.

III. The narrow factual circumstances of this case present no question of general importance warranting review by this Court.

It is respectfully submitted that it is the uniqueness of the facts of this case which required the finding that dismissal was "in the best interest of the estate". Bankruptcy Rule 11-42. As a result, it is unlikely that similar relief will be appropriate, or necessary, in other Chapter XI proceedings which have been commenced under the old Act.

IV. Section 403 of Title IV of the new Bankruptcy Code preserves the rights granted under the old Bankruptcy Act and Bankruptcy Rule 11-42.

Neither the old Bankruptcy Act nor the new Bankruptcy Code contain any provisions respecting substantive consolidation of cases. No intention to pro-

hibit the dismissal of the Geiger Enterprises Chapter XI case or a possible subsequent consolidation can be implied from a "savings" provision, Section 403 of Title IV of the Bankruptcy Code.

Section 403(a) is "persuasive evidence of Congress' desire not to impair the rights of parties to actions commenced under the old Bankruptcy Act." *In re Adamo*, 619 F.2d 216 (2d Cir.), *cert. denied*, 101 S.Ct. 125 (1980). The right to seek and obtain a dismissal pursuant to Bankruptcy Rule 11-42 is a right preserved by Section 403(a).

The United States and Central Trust assert that the "plain meaning" of Section 403(a) prohibits the dismissal of the Geiger Enterprises Chapter XI case. The manifest purpose of Section 403(a) is to continue the applicability of the provisions of the old Bankruptcy Act to cases filed prior to October 1, 1979 despite its repeal by Section 401. Dismissal pursuant to Rule 11-42, therefore, is preserved by Section 403(a), and consolidation remains a nonstatutory proceeding to be determined by the courts on a case by case basis.

The decision below avoids "a construction of the BRA [Bankruptcy Reform Act] which, for no discernible reason, would" prohibit the consolidation of "debtors who, by sheer chance, have their bankruptcy petitions" filed before and after October 1, 1979. *In re Adamo*, 619 F.2d 216 (2d Cir.), *cert. denied*, 101 S.Ct. 125 (1980).

> There is no surer way to misread any document than to read it literally; * * * As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; * * * *In re Adamo*, 619 F.2d at 222 quoting, *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Buffalo, New York
June 10, 1981

Respectfully submitted,

DONALD P. SHELDON
Attorney for Official Creditors' Committee of Geiger Enterprises, Inc.
14 Lafayette Square
Buffalo, New York 14203

DANIEL E. BRICK
Attorney for Geiger Enterprises, Inc.
91 Tremont Street
North Tonawanda, New York 14120

Brick, Brick & Elmer, P.C.
91 Tremont Street
North Tonawanda, New York 14120
Of Counsel

DAVID K. FLOYD
Attorney for Amoco Oil Company
3400 Marine Midland Center
Buffalo, New York 14203

Robert M. Spaulding
William J. Brown
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203
Of Counsel

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